

**COURT OF APPEALS
DECISION
DATED AND FILED**

SEPTEMBER 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-1063

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**IN THE INTEREST OF JEREMY M.F., A PERSON UNDER
THE AGE OF 18:**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JEREMY M. F.,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Bayfield County:
THOMAS J. GALLAGHER, Judge. *Affirmed.*

CANE, P.J. Jeremy M. F. appeals a juvenile dispositional order adjudging him delinquent based upon the trial court's finding him guilty of having sexual contact with a child under the age of thirteen years. Jeremy claims the evidence is insufficient to support the finding and that he had ineffective assistance of trial counsel who failed to advise him of his right to a jury trial;

introduce photographs of the alleged crime scene; and call Jeremy's stepfather as an alibi witness. This court rejects his claims and affirms the order.

The fact finding hearing was held before the trial court without a jury. At the hearing, Julie M.F. testified that when she was riding on a bike with Jeremy, he put his hands on her breasts while they were in an alley and later put his "dick," which was hard, inside her "crotch area" while they were near some bushes. Her mother testified that Julie was eleven years old at the time of the incident.

Jeremy testified that he was with Julie, but denied having any sexual contact with her. One other witness, Damian B., a fourth grader, testified that initially he and Jeremy were riding bikes together when they went to a friend's house and met Julie. He saw Julie get on Jeremy's bike with Jeremy pedaling and Julie standing on the rear tire pegs. Before they got on the bike, Damian said that Julie tried to hug and kiss Jeremy who pushed her away. He saw them ride together around the area and then Jeremy let her off the bike at her grandmother's house. He saw no sexual contact.

Jeremy contends that Julie's testimony is incredible in that the sexual contact would have had to occur in an open residential area and, therefore, the evidence is insufficient to support the trial court's finding. On appellate review, the test is not whether this court is convinced beyond a reasonable doubt that Jeremy committed the offense but, rather, whether the trial court, acting reasonably, could be convinced under the evidence it could accept as true. *State v. Daniels*, 117 Wis.2d 9, 17, 343 N.W.2d 411, 415 (Ct. App. 1983). When there are inconsistencies in testimony, it is the fact finder's duty to determine the weight and credibility of the testimony. This court is not to substitute its judgment for the

fact finder unless it relied upon evidence that was inherently or patently incredible.
Id.

Here, the trial court heard and saw the testimony of the witnesses and determined that Jeremy committed the offense. Although Jeremy and Damian contradicted Julie's testimony, it was for the trial court to weigh the evidence and determine the credibility of these witnesses. This court cannot conclude that Julie's testimony was inherently or patently incredible.

Next, Jeremy contends that he had ineffective assistance of trial counsel because counsel had not advised him of his right to a jury trial, failed to introduce photographs of the alleged crime scene and failed to call Jeremy's stepfather as an alibi witness. The standard of appellate review for claims of ineffective assistance of counsel is well established and need not be stated at great length here except to say that to be successful on this claim, one must establish both that his attorney's performance was deficient as falling below an objective standard of reasonableness and that the deficient performance prejudiced the outcome of the case. *State v. Johnson*, 153 Wis.2d 121, 127, 449 N.W.2d 845, 847-48 (1990).

In support of Jeremy's claim, his trial counsel admitted that he had not advised Jeremy of his right to a jury trial. However, at the initial plea hearing, the trial court advised Jeremy in open court of his right to a jury trial. Consequently, this court fails to see how Jeremy was prejudiced.

Also, Jeremy contends that the failure of his trial counsel to introduce photographs of the area described by the witnesses constitutes ineffective assistance of counsel. At the postconviction hearing, trial counsel testified that the failure to take photographs was a deliberate trial strategy in that

he did not think it would be helpful as the offense was alleged to have occurred in an open residential area. Furthermore, after having had an opportunity to review the proposed photographs of the area, the trial court concluded at the postconviction hearing:

The photograph[], again, is a strategy issue argument. And this is where the fact that I am the fact-finder, the fact-finder is especially unique in a situation like this, because I can tell you that Mr. Perrine [trial counsel] did an excellent job. The witnesses did an excellent job of describing the scene, because, you know, I have never seen this place before, and these photographs are exactly the way I envisioned the place looking like, based on the testimony. And this was, you know, this is a strategy thing. There was room behind those bushes, and the bushes do provide a considerable amount of cover.

Based on this review of the record, this court concludes that Jeremy was not denied effective assistance of counsel.

Finally, Jeremy contends that his counsel's failure to call Jeremy's stepfather as an alibi witness was ineffective assistance of counsel. However, the apparent purpose of the stepfather's testimony was not to show that the offense did not occur, but that he was with Jeremy later that day. This court fails to see how this testimony would have been relevant or helpful. As the trial court stated in determining that counsel's failure to call the stepfather was not ineffective: "And the date thing, you know, considering the testimony, it just wouldn't have made any difference, that wasn't an issue. It simply was a difference in story about what happened during the time that they were together that day."

Therefore, this court concludes there was sufficient evidence to support the trial court's finding that Jeremy committed the sexual assault and that Jeremy's trial counsel was not ineffective. The order is affirmed.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.

